No. 73-1566

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

TENNECO INC., a corporation, and TEXAS EASTERN TRANSMISSION CORPORATION, a corporation, *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, ELIZABETH V. HALLANAN, Its Chairman, and ROBERT L. STEWART and MILFORD L. GIBSON, Members of Said Commission, *Respondents*,

and

THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Intervening Defendant and Respondent.*

AMICUS CURIAE BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Of Counsel:

JAMES W. MCCARTNEY
C. MICHAEL HARRINGTON
VINSON, ELKINS, SEARLS
CONNALLY & SMITH
First City National
Bank Bldg.
Houston, Texas 77002

JEROME J. MCGRATH
1660 L Street, N. W.
Washington, D. C. 20036
Attorney for Amicus Curiae,
Interstate Natural Gas
Association of America

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The Interstate Natural Gas Association of America (INGAA) having obtained the consent of all parties as required by Rule 42 of this Court, submits this brief as amicus curiae in support of the petition for writ of certiorari filed in this cause by petitioners Tenneco Inc. and Texas Eastern Transmission Corporation.

INTEREST OF AMICUS CURIAE

INGAA is a non-profit association. Its members include most of the natural gas transmission companies subject to the regulatory jurisdiction of the Federal Power Commission under the Natural Gas Act.[1] Their operations account for more than ninety percent (90%) of the gas transported and sold annually in interstate commerce in the United States. They conduct operations and have facilities in every state in the continental United States except Vermont.

INGAA has participated as an intervenor or amicus curiae before this Court and various United States Courts of Appeals. It undertakes to participate in regulatory and judicial proceedings which are of substantial, industry-wide significance. This is such a case.

In denying the relief sought by petitioners Tenneco Inc. and Texas Eastern Transmission Corporation, the Fourth Circuit held that the West Virginia Public Service Commission can impose fees on interstate pipeline companies, which are subject exclusively to the jurisdiction of the Federal Power Commission, to defray the costs associated with acting as agent of the Secretary of Transportation under the Natural Gas Pipeline Safety Act.[2] The pattern set here will be followed in other states. Already New York and Tennessee have adopted legislation authorizing the assessment of inspection costs by their respective public service commissions against interstate pipelines with

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[1] 15 U.S.C. § 717, *et seq.*

[2] Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1671, *et seq., as amended* 49 U.S.C.A. § 1671, *et seq.* (Supp. 1974). [Hereinafter "Federal Safety Act."]

facilities in that state.[3] In all, thirty-nine states have agreed to act and are acting as agents of the Secretary of Transportation in the safety inspection of interstate pipeline transmission facilities.[4] Consequently, while the amount of the fees directly involved here is comparatively small, the potential impact of the lower court's decision on INGAA's members is substantial.

REASONS FOR GRANTING THE WRIT

The correct resolution of the issues in this case is of signal importance to INGAA's members and the gas-consuming public in general. INGAA agrees, in this respect, with the National Association of Regulatory Utility Commissioners (NARUC), which stated below:

> "[T]he fundamental issues here presented are ones of great national significance. The disposition of this action by the Court will be of paramount regulatory importance and will create a precedent which will be applied by analogy throughout the utility field."[5]

The Fourth Circuit has held that states may tax interstate pipeline companies, which are subject to the jurisdiction of the Federal Power Commission, to defray the states' costs of acting as agents of the Secretary of Transportation for purposes of pipeline safety inspection and surveillance. This decision is erroneous and should be corrected. It abrogates congressional

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[3] *N.Y. Pub. Serv. Law* ch. 446 (McKinney 1972); Pipeline Companies, *Tenn. Code Ann.* § 65-2814 (Supp. 1973), *as amended* Tennessee Public Acts of 1974, ch. 74b.

[4] The Secretary of Transportation announced on March 18, 1974, the allocation of $1.175 million for fiscal year 1974 to these 39 states under the Federal Safety Act. *See Department of Transportation News* 1-2 (March 18, 1974).

[5] Motion of NARUC to intervene as Defendant at 6, *Tenneco Inc. v. Pub. Serv. Comm'n*, 352 F. Supp. 719 (S.D. W.Va. 1973).

intent with respect to the funding of safety programs and conflicts with fundamental concepts of preemption.

1. The legislative history of the Federal Safety Act indicates the conscious design of Congress that funding of the federal safety program not be through the collection of annual fees from pipeline companies subject to the Act. The matter was raised and Congress declined to authorize the Secretary to exact such fees. House Report No. 1390 states that it was determined that such expenses "should be met through the usual route of authorized and appropriated funds".[6] It took similar action again in 1972, after this controversy had arisen, in turning down a proposed amendment submitted by NARUC which would have authorized the states to assess interstate pipeline companies to defray the states' costs of acting as agents for the Secretary of Transportation.[7] The lower court has thus erroneously sanctioned that which Congress twice rejected.[8]

2. The West Virginia funding method is in categorical conflict with that provided by the 1972 amendment to Section 5(c)(1) of the Federal Safety Act,[9] in that it undertakes to impose all of the cost burden

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[6] 3 *U.S. Code Cong. & Adm. News,* 90th Cong., 2d Sess. 3255 (1968).

[7] *See* 2 *U.S. Code Cong. & Adm. News,* 92d Cong., 2d Sess. 3055 (1972).

[8] Further, since Congress specifically declined to authorize assessment of fees against interstate pipelines by the principal, i.e., the Department of Transportation, it is wholly inconsistent to contend that the agent, i.e., the State of West Virginia, has powers which exceed those of the principal.

[9] 49 U.S.C.A. § 1674(c)(1) (Supp. 1974), *amending* 49 U.S.C. § 1674(c)(1).

on the consumers served by petitioners whereas that section contemplates a sharing of the cost by the state and federal citizenry in general. INGAA's members are regulated utilities. Taxes or state assessments such as West Virginia would impose on petitioners are recovered through rates charged petitioners' customers and are ultimately borne by the gas consumers which they serve, most of whom, in fact, reside outside of West Virginia. Clearly, as Congress recognized, the general public has a significant stake in the safety of the pipeline facilities, whether or not they are directly served by such facilities.[10]

3. The funding method provided by Section 5(c)(1),[11] as amended in 1972, provides the Secretary with a sanction short of decertification against states which are not satisfactorily performing their agency responsibilities. This was the expressed purpose of the 1972 amendment.[12] Permitting West Virginia to impose the assessments at issue here against petitioners effectively denies the Secretary that sanction. The West Virginia assessment is not conditioned in any respect upon the satisfactory performance by that state commission of its agency responsibilities, nor does it purport to cover only unreimbursed costs. Under the lower court's decision and with the § 5(c)(1) grant, West Virginia could be recovering more than its actual costs in acting as agent of the Secretary.

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[10] *See* 2 *U.S. Code Cong. & Adm. News*, 92d Cong., 2d Sess. 3049-50 (1972).

[11] 49 U.S.C.A. § 1674(c)(1) (Supp. 1974), *amending* 49 U.S.C. § 1674(c)(1).

[12] *See* 2 *U.S. Code Cong. & Adm. News*, 92d Cong., 2d Sess. 3053 (1972).

4. Finally, Congress has functioned on precisely the subject matter in a manner contrary to that provided by West Virginia. Federal preemption has occurred. As Tenneco Inc. and Texas Eastern Transmission Corporation note in the petition, no residuum of state regulatory authority remains over interstate pipeline companies subject to the jurisdiction of the Federal Power Commission. There is no state-related action or incident which would constitute support for the assessment.

The Court is urged to take jurisdiction to correct the erroneous decision of the court below and to assure that the burden of state assessments to defray the costs of their acting as agents of the Secretary of Transportation falls where it was placed by Congress—on the public in general—not on INGAA's members or the consumers which they serve.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JEROME J. MCGRATH
1660 L Street, N. W.
Washington, D. C. 20036
Attorney for Amicus Curiae, Interstate Natural Gas Association of America

May, 1974